United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,428
(C.C. 1277-66)

198

JOHN L. BAILEY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Of Counsel:

Dow, Lohnes and Albertson
600 Munsey Building
Washington, D. C. 20004

Bernard J. Long, Sr.
Alan C. Campbell
Attorneys for Appellant
(By Appointment of this Court)

March 25, 1968

STATEMENT OF QUESTIONS

The Questions presented are:

1. Whether the Trial Court should have granted Appellant's motion for judgment of acquittal, since the evidence was such that no reasonable jurymen could find beyond a reasonable doubt that Appellant aided and abetted in the commission of a robbery.

2. Whether the Trial Court committed an abuse of discretion in permitting the use of Appellant's prior criminal convictions for impeachment.

3. Whether the Trial Court failed to properly instruct the jury that the government had to prove beyond a reasonable doubt that Appellant participated in the robbery.

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by the United States District Court for the District of Columbia upon Appellant's conviction by a jury of a violation of 22 D. C. Code Ann. §2901. The United States District Court for the District of Columbia had jurisdiction of the matter by virtue of 11 D. C. Code Ann. §521. The jurisdiction of this Court to hear this appeal is claimed on the basis of the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 USC §1291.

STATEMENT OF THE CASE

Appellant was charged in a one count indictment with the crime of robbery, the alleged event having occurred on September 26, 1966. The fact of the robbery is not in dispute. Rather, the question involved in the trial of the case was Appellant's role in the crime. Appellant was prosecuted as an aider and abettor. The principal offender who physically committed the crime had not been apprehended at the time of trial and his identity was not disclosed at trial. The facts surrounding the event are as follows.

The victim, Wilson C. Lawson, Jr., worked part-time in the early evening as a bookkeeper for Center Market Provision Company, Inc., 115 R Street, S.W., which is a wholesale meat distributor (Tr. 4-5).[1/] Lawson was required to check-in Center Market's drivers, take their cash, total the receipts, and prepare a bank deposit of the receipts. Lawson would then take the bank deposit with him when he left which varied from day to day depending on the time the last driver returned. Lawson would deposit the receipts the next day with Suburban Trust where he held a full-time job. This was a general procedure which Lawson had followed for a period of time prior to September 26, 1966 (Tr. 5-6).

1/ Reference to the trial transcript will be given as "Tr. ____". The main transcript covers pages 1-227. In addition, a supplemental transcript, pages 1-32, containing the opening and closing statements of counsel, was prepared. Reference to this supplemental transcript will be given as "S.Tr. _____".

On the day of the robbery, Lawson left Center Market at approximately 6:45 P.M. with the day's receipts, approximately $1900.00 in cash and $3200.00 in checks (Tr. 11), in a brown paper bag (Tr. 7). As he was leaving his office, Lawson testified he saw two men standing behind one of Center Market's trucks in the parking lot in front of Center Market. This truck was parked next to Lawson's car (Tr. 9). However, Lawson did not particularly notice them. Lawson merely observed that two men were standing behind the Center Market truck. He made this observation in a general way while he was locking the door to his office and walking down the loading platform steps toward his car (Tr. 28-33). Lawson was not able to identify Appellant as one of these two men although he did say he looked like one of them (Tr. 12-13).

As Lawson approached the trunk of his car he did not know the exact position of the men he noticed behind the truck and he did not look at either individual (Tr. 33-36). When Lawson reached the trunk of his car a short, heavy built individual, about 5 feet 8 inches tall pointed a gun at him and grabbed the paper bag containing the money (Tr. 10-11). Lawson testified that the other individual, whom Lawson said looked like Appellant, had moved toward the curb of R Street about 10 feet away, although he could not say when Appellant moved away from the back of the truck. Lawson testified that another witness, Burt J. Kearns, hollered something about the robbery, and he saw the short unidentified man and Appellant run down R Street toward Second Street (Tr. 36-37).

Joseph J. Tyler operates an auto moving business at 1711 First Street, S.W., which is on the other side of R Street from Center Market. Tyler testified that, while he was burning an auto, he saw Appellant and another man on his side of R Street about 4:30 P.M. talking together (Tr. 43) and apparently shooting craps with each other (Tr. 59). Tyler identified Appellant as the taller of the two individuals and described the other unidentified man as short although he could not describe him in any way (Tr. 44, 48-49). Around 5:00 P.M. Tyler observed Appellant leave the scene (Tr. 47) and return sometime thereafter (Tr. 48-61). Tyler testified that he subsequently heard a commotion (Tr. 49, 61) and saw Appellant and the other man running on R Street toward Second Street (Tr. 49). Tyler saw the unidentified male carrying a paper bag in his hand as he was running (Tr. 51).

Raymond A. Hawkins, an employee of Center Market, was also called as a witness by the government. Hawkins testified that on the day in question, Appellant joined him and some other men in a crap game in front of Center Market sometime after 3:30 P.M. (Tr. 67-68). Hawkins saw Appellant on the other side of R Street prior to the time he joined the crap game (Tr. 74). Hawkins went home after the crap game ended and did not witness the robbery (Tr. 74).

The government also called Burt J. Kearns, a delivery man for Bill Kustinas Produce which is located one store up from Center Market at 101 R Street, S.W. Kearns returned from making his deliveries around 4:30 P.M. on the day in question. At that time, he noticed Appellant and another man on the other side of R Street. They appeared to be shooting craps (Tr. 83). Sometime after 5:30 P.M. Kearns and

several other men began to shoot craps in the parking lot in front of Center Market and were joined by Appellant (Tr. 84-85). After the game ended, Kearns testified that Appellant "walked back across the street to the truck where the other boy was." The other man did not join the game but remained on the other side of R Street (Tr. 86-87).

Shortly thereafter Kearns testified that he saw Appellant and the other man standing behind a truck near Mr. Lawson's car on the Center Market side of R Street (Tr. 89). However, Kearns stated that, prior to the time Lawson came out of Center Market, Appellant walked over to the curb of R Street and stood on the "apron" of R Street (Tr. 88-89). Kearns saw the short unidentified male point a gun at Lawson and grab his paper bag (Tr. 88). Kearns yelled "Look, they're robbing him" and he saw Appellant and the other man run up R Street toward Second Street (Tr. 89-90).

On cross-examination, Kearns stated that he went into the office of Kustinas Produce after the crap game ended and when he emerged he saw Appellant and the other man standing together in the parking lot in front of Center Market (Tr. 95). Kearns stated that Appellant "walked away" from the other man to the curb of R Street (Tr. 97). Kearns did not see Appellant go up to Lawson or do anything to Lawson (Tr. 98). After the robbery, Kearns testified that Appellant and the other man ran up R Street toward Second Street with the other man carrying the paper bag (Tr. 99).

The final eye witness called by the government was Nathaniel Couser, also an employee of Bill Kustinas Produce. Couser saw Appellant and another man on the other side of R Street shooting craps (Tr. 107,

117-118). Sometime after 4:00 P.M., Couser and several other men started a crap game in front of Center Market and were joined by Appellant (Tr. 106-107). After the crap game ended, Couser saw Appellant walk back across R Street (Tr. 123) and then return with the other man and stand behind one of Center Market's trucks (Tr. 124). Couser testified that he did not pay any particular attention to Appellant after that (Tr. 125). Couser then heard the witness Kearns holler "look out" and when he turned to look he saw Appellant and another man running down R Street (Tr. 112). Couser saw the shorter unidentified man carrying something when he was running on R Street (Tr. 115).

At the conclusion of the government's case, trial counsel for Appellant made a motion for judgment of acquittal for failure to prove a prima facie case of robbery. The motion was denied (Tr. 145). This motion was renewed at the conclusion of all the evidence and was again denied (Tr. 203).

Appellant was called as the only defense witness. He testified that he left his house that afternoon to go gambling (Tr. 186). Appellant testified that he had gambled in the vicinity of R Street on prior occassions (Tr. 187). Appellant arrived alone in the vicinity of Center Market around 3:30 P.M. He met a short stocky man with whom he shot craps (Tr. 168-169, 190). Appellant testified that he did not know this man (Tr. 199). Appellant further stated that he did not see the unidentified man with whom he first shot craps after their game (Tr. 199).

After this initial game, Appellant departed and purchased a soda and potato chips (Tr. 191). Appellant returned shortly there-

after and entered the larger crap game on the parking lot in front of Center Market (Tr. 169, 190-191, 193). When this second crap game ended, Appellant stated that he walked to the crub of R Street where he started to count his money (Tr. 169-171, 195, 198). Appellant then heard hollering about a robbery and "call the police" and "I just got excited and I broke out running" (Tr. 170-171, 200-201). Appellant ran up R Street toward Second Street by himself. He did not see anyone else running beside him (Tr. 202). Appellant testified that he did not agree to help anyone rob Mr. Lawson (Tr. 171). The government did not introduce any evidence to link Appellant with the proceeds of the robbery.

Prior to the time Appellant took the stand, the jury was excluded and counsel for Appellant asked the District Judge whether or not he would permit the government to impeach Appellant by use of his prior convictions (Tr. 145). Trial counsel stated that if called, Appellant would testify as follows:

> "Your Honor, I believe that the defendant would testify that he was present at the scene of the robbery that particular day. He did not participate in any way in this robbery, that when the robbery took place he just took off. He was there gambling with these other fellows." (Tr. 146)

The court was handed a copy of Appellant's criminal record (4 pages long, Tr. 147) and reviewed it. The District Judge asked one question about a pending case and then ruled:

> "After looking over this record I think that the Court will exercise its discretion and permit the government to ask any pertinent questions regarding prior convictions of crimes involving moral turpitude. There are several on here for disorderly conduct and other things which ordinarily we do not

> permit, but there are others which I think would be admissible. So in view of that statement I think the Court will permit the government to proceed and question the defendant, if he takes the stand, as to his prior record. All right." (Tr. 147)

After that ruling, the Assistant United States Attorney read the Appellant's prior convictions into the record as follows: grand larceny, 1951; assault on a police officer, 1957; and attempted housebreaking, 1962 (Tr. 147-148). The Assistant United States Attorney then volunteered that he would not attempt to impeach Appellant with respect to his conviction for assault on a police officer (Tr. 148). Appellant was questioned with respect to his conviction for attempted housebreaking (Tr. 173), and for his conviction of grand larceny (Tr. 202).

STATUTES INVOLVED

22 D.C. Code Ann. §22-105 provides:

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offence or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

22 D.C. Code Ann. §22-2901 provides:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Rule 29(a) Federal Rules of Criminal Procedure, provides:

Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

STATEMENT OF POINTS

I. The District Judge erred in denying Appellant's motions for judgment of acquittal.

Appellant respectfully requests this Court to read the following pages of the transcript in connection with this point: Tr. 5-13; 28-37; 43-51; 61; 67-74; 83-89; 95-99; 106-118; 123-124; 168-171; 186-193; 199-202. S. Tr. 20.

II. The District Judge erred in permitting the government to impeach Appellant by use of his prior criminal record.

Appellant respectfully requests this Court to read the following pages of the transcript in connection with this point: Tr. 145-148; 173-175; 202.

III. The District Court failed to properly instruct the jury with respect to the government's burden to prove beyond a reasonable doubt Appellant's participation in the crime.

Appellant respectfully requests the Court to read the same transcript pages set out in point I, above.

SUMMARY OF ARGUMENT

I.

Appellant was convicted of the crime of robbery. The government's theory of the case was that Appellant aided and abetted an unidentified man in the commission of the crime. The presence of Appellant at the scene of the robbery was not in question. Rather, the point in issue was whether Appellant participated in the offense. The government failed to introduce sufficient evidence to prove beyond a reasonable doubt that Appellant aided and abetted in the commission of a robbery. Thus, the District Judge should have granted Appellant's motion for judgment of acquittal and should not have permitted the jury to speculate on the basis of legally inadequate evidence.

II.

Prior to the time Appellant took the stand in his defense, the District Judge was asked whether or not he would permit the government to cross examine Appellant on the basis of his prior criminal convictions. Counsel for Appellant outlined to the District Judge the nature of Appellant's testimony. The District Judge was informed as to Appellant's prior criminal record. The District Judge failed to properly apply the factors enunciated by this Court in Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965) and committed prejudicial error by permitting the government to use Appellant's prior criminal convictions for the purpose of impeachment.

III

The question the jury had to determine was whether Appellant participated in the commission of a robbery. The government had to prove beyond a reasonable doubt not only that Appellant was present but that he participated in the offense. The District Judge failed to properly instruct the jury that the government must prove beyond a reasonable doubt that Appellant participated in the robbery. The failure to do so was plain error requiring reversal of Appellant's conviction.

I

The Court Erred In Failing To Grant Appellant's Motion For Judgment Of Acquittal.

As stated, at the conclusion of the government's direct case, counsel for Appellant made a motion for judgment of acquittal on the ground of failure to prove a prima facie case of robbery against Appellant. This motion was denied by the District Judge. The motion was renewed and again denied at the conclusion of all the evidence. It is submitted that the failure to grant this motion was error requiring reversal by this Court.

In challenging the sufficiency of the direct case against Appellant, it is, of course, true that, "the jury verdict must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." Campbell v. United States, 115 U.S. App. D.C. 30, 31, 316 F.2d 681, 682 (1963); United States v. Wilson, 361 F.2d 134 (7th Cir. 1966). With this standard in mind, it is necessary to review somewhat in detail the direct evidence presented by the government which would support a finding that Appellant aided and abetted in the commission of a robbery.

The evidence presented by the government indicates that Appellant was seen in the area where the robbery was committed. He was seen approximately two hours before the robbery on the other side of R Street talking to and shooting craps with the unknown man later identified as the assailant. Appellant thereafter left the scene alone and later returned. He then joined another crap game at which time the unidentified man was not in his company. After the game ended, Appellant crossed R Street to where the unidentified man was and later returned

to the Center Market side of R Street. Sometime thereafter Appellant and the unidentified man were seen behind one of the trucks in front of Center Market. Appellant walked away from the unidentified man prior to the time of the robbery and stood on the curb of R Street. After the robbery, Appellant and the unidentified man were seen running on R Street in the direction of Second Street.

At best, the government introduced evidence that Appellant was in the company of the unidentified man at various times in the vicinity of Center Market. He was seen with the unidentified man shortly before the robbery and he and the unidentified man fled in the same direction. At the same time the evidence also shows that Appellant shot craps with several other persons that same afternoon and that prior to the robbery he had walked away from the unidentified man. On the other hand, the evidence does not show that Appellant planned or took part in the robbery; that he knew the assailant; that he acted as a lookout for the unidentified man; or, that he received any of the proceeds of the robbery. In sum, the evidence introduced by the government fails to show beyond a reasonable doubt that Appellant aided and abetted anyone in the commission of a robbery.

In order to be convicted of aiding and abetting more is required than evidence that Appellant was at the scene of the crime. There must be competent evidence as to his participation in some degree in the offense. Mere presence at the scene of a crime does not raise an inference as to guilt for the offense. Newsom v. United States, 335 F.2d 237, 239 (5th Cir. 1964); United States v. Carengella, 198 F.2d

3, 7 (7th Cir. 1952). Even if Appellant were present and had knowledge that a crime was being committed, this would not constitute aiding and abetting. Hendrix v. United States, 327 F.2d 971, 974 (5th Cir. 1964); United States v. Garguilo, 310 F.2d 249, 253 (2d Cir. 1962); United States v. Dellaro, 99 F.2d 781, 783 (2d Cir. 1938).

The government was required to prove more than mere presence and perhaps the inference of knowledge since Appellant was seen in the company of the robber. The government had to show that Appellant had taken some affirmative act to associate himself with the crime. Cooper v. United States, 123 U.S. App. D.C. 83, 357 F.2d 274 (1966); United States v. Garguilo, supra; United States v. Dellaro, supra. Government counsel, apparently recognizing this failure of proof, offered two possible hypotheses to the jury; either Appellant planned the robbery or acted as a lookout.[1/] However, the government introduced no evidence other than the fact Appellant and the man identified as the robber were seen together. More is required. There was no evidence introduced that would indicate Appellant acted in either capacity suggested by the government in its closing argument to the jury. Absent such proof, there was no competent evidence that Appellant aided and abetted in the commission of a robbery. Scott v. United States, 98 U.S. App. D.C. 105, 232 F.2d 362 (1956).

1/ Interestingly, no suggestion was made as to the actual role Appellant played in the crime until closing argument. At that time, the Assistant United States Attorney argued that Appellant planned the robbery and/or acted as a lookout (S. Tr. 20). No questions were asked of any of the eye witnesses as to Appellant's actions when he walked over to R Street after walking away from the unidentified man. In fairness, the government should have made clear the role it alleged Appellant played while an opportunity remained for cross examination.

A. Flight As Evidence Of Guilt

Assuming there is no other evidence which would prove beyond a reasonable doubt that Appellant was an aider and abettor, the question is whether the fact that he fled after the robbery is sufficient standing alone to submit the case to the jury. It is respectfully submitted that it is not.

Flight is not evidence of guilt but is only some evidence of consciousness of guilt. Miller v. United States, 116 U.S. App. D.C. 45, 320 F.2d 767 (1963); Vick v. United States, 216 F.2d 228 (5th Cir. 1954). As stated by the Supreme Court in Wong Sun v. United States, 371 U.S. 471, 483, n.10 (1963):

> "[W]e have consistently doubted the probative value in criminal trials of evidence that the accussed fled the scene of the actual or supposed crime."

Of course, where there is sufficient evidence of guilt to go to the jury, then the additional evidence of flight may be admissable as a circumstance for the jury to consider. E.g. Ingram v. United States, 241 F.2d 708 (5th Cir. 1957). However, where the only evidence against an accussed is his presence at the scene and flight the case should not be submitted to the jury. E.g. Williams v. United States, 361 F.2d 280 (5th Cir. 1966); Vick v. United States, supra. As stated in United States v. Paige, 324 F.2d 31-32 (4th Cir. 1963):

> "Mere presence at the perpetration of a crime is not criminal. [Appellant's] flight may, of course, be taken to evince his consciousness of guilt. (Citation omitted) But, quite conceivably, other reasons may have prompted him to run. Such a reaction thus might not be inconsistent with innocence. Presence and flight

> in the circumstances here could not alone prove him particeps criminis beyond a reasonable doubt."

Certainly, the reluctance of the courts to place a great reliance upon flight is attributable to the ambiguity attached to evidence thereof.[2/] The motives, other than guilt, which may prompt a person to flee are numerous. Thus, in a given case flight may be equally consistent with innocence as with guilt. For example, in this case Appellant heard someone holler something about robbery and call the police. In virture of this criminal record, the fact that he had just finished gambling, and his excitement, it is not so unusual that Appellant fled. As this Court remarked in Cooper v. United States, 94 U.S. App. D.C. 343, 345, 218 F.2d 39, 41 (1954):

> "[B]ut standing alone it [asking witness to support alibi] is explained by terrorized innocence as well as by a sense of guilt. After all, innocent people caught in a web of circumstances frequently become terror-stricken."

Similarly, Scott v. United States, supra, 98 U.S. App. D.C. at 106, 232 F.2d at 363, considered a false denial of acquaintance with an arrested person as "a natural human reaction to a sudden inquiry by the police..." Flight also is a natural reaction, insufficient to prove guilt beyond a reasonable doubt.

In sum, the government failed to prove beyond a reasonable doubt that Appellant participated in the crime of robbery.[3/] As Judge

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2/ See also Borum v. United States, ____ U.S. App. D.C. ____, 380 F.2d 595 (1967).(evidence ambiguous as to when fingerprints could have gotten on objects where housebreaking occurred); United States v. Minieri, 303 F.2d 550, 557 (2d Cir. 1962).(location of fingerprint was as consistent with innocence as with guilt of possession of stolen property).

3/ Although there may be evidence sufficient to create a suspicion or even a "robust suspicion" as to Appellant's guilt that is not sufficient and a judgment of acquittal should have been granted. United States v. Wainer, 170 F.2d 603, 606 (7th Cir. 1948); Campbell v. United States, supra; Scott v. United States, supra; Cooper v. United States, supra.

Prettyman wrote in Cooper v. United States, supra, 94 U.S. App. D.C. at 346, 218 F.2d at 42:

> "Guilt, according to a basic principle in our jurisprudence, must be established beyond a reasonable doubt. And, unless that result is possible on the evidence, the judge must not let the jury act; he must not let it act on what would necessarily be only surmise and conjecture, without evidence."

Appellant recognizes that he has a weighty task in attempting to show that the District Judge erred in denying his motion for judgment of acquittal. However, in this case, giving full weight to the government's evidence, it is submitted that reasonable jurymen must have had a reasonable doubt as to guilt, necessitating grant of Appellant's motion for judgment of acquittal. Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 229 (1947).[4/]

4/ In Curley this Court applied the rule that in a circumstantial evidence case conviction is warranted only if the facts proved are consistent only with guilt and inconsistent with innocence. 81 U.S. App. D.C. at 394, 160 F.2d at 234. In Holland v. United States, 348 U.S. 121 (1954), the Supreme Court suggested a "better rule" is that a proper instruction on reasonable doubt is adequate without the addition of the language used in Curley. This Court has apparently adopted the "better rule" set forth in Holland. Hunt v. United States, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963). However, in Hunt this Court stated that it would not be improper to give an "every reasonable hypothesis" instruction. 115 U.S. App. D.C. at 3, 316 F.2d at 654. Under Curley the government's evidence clearly failed to exclude every reasonable hypothesis but guilt.

II

The Court Erred In Permitting Impeachment Of Appellant By The Use Of Prior Criminal Convictions

Prior to putting Appellant on the stand, counsel asked the District Judge whether he would permit impeachment of Appellant by use of his prior criminal convictions (Tr. 145). At the time this request was made, the District Judge was informed of the testimony which Appellant would give and he was also given a copy of Appellant's criminal record (Tr. 146-147).[5/]

As the record discloses, the District Judge examined Appellant's criminal record, asked one question concerning a pending case, and then ruled that, with the exception of disorderly conduct cases, the government would be permitted "to ask any pertinent questions regarding prior convictions of crimes involving moral turpitude" (Tr. 147). After this carte blanche ruling, the Assistant United States Attorney read Appellant's prior convictions into the record: grand larceny in 1951; assault on a police officer in 1957; and attempted housebreaking in 1962 (Tr. 147-148). The government then voluntarily stated that the conviction for assault on a police officer would not be used for impeachment (Tr. 148).[6/] It is submitted that

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5/ Unlike the case of Hood v. United States, 125 U.S. App. D.C. 16, 365 F.2d 949 (1966), the District Judge was called upon to make a meaningful exercise of his judicial discretion whether or not to permit impeachment of Appellant by his prior criminal record. Cf., Payne v. United States, No. 21,232, D.C. Cir., March 5, 1968, slip op. p. 4.

6/ Even though the government did not use the assault on a police officer conviction for impeachment, the District Judge, in supposedly exercising his discretion in this area, did not so limit the use of Appellant's prior record. Appellant was impeached as to the 1962 attempted housebreaking conviction (Tr. 173) and the 1951 grand larceny conviction (Tr. 202). Consideration of the 1962 conviction is complicated by the fact that it was also used to impeach Appellant's testimony that he had worked uninterruptedly for eight years (Tr. 172-175).

the District Judge erred in permitting cross examination of Appellant as to his prior criminal record, at least insofar as his conviction for grand larceny in 1951 is concerned.

In the case of Luck v. United States, 121 U.S. App. D.C. 151, 156, 348 F.2d 763, 768 (1965), this Court stated that:

> "The trial court is not required to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute [14 D.C. Code §305], in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case...There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility." (emphasis in original)

This same proposition was reiterated in Smith v. United States, 123 U.S. App. D.C. 259, 261, 359 F.2d 243, 245 (1966).

Further, this Court in Luck went on to point out some of the relevant factors which a trial judge should consider in exercising this discretion. As stated therein, at 157, 348 F.2d at 769:

> "In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction."

In a more recent case, Gordon v. United States, ____ U.S. App. D.C. ____, 383 F.2d 936 (1967), this Court clarified the meaning of the factors set forth in Luck. For example, crimes not directly related to credibility, e.g. assaultive crimes, and prior convictions

which are "remote" in time to the present charge might be excluded.[7] In Gordon, this Court also cautioned that extreme care should be exercised with respect to prior convictions for the same or similar crimes.[8] Finally, in Gordon, this Court suggested that the on-the-record consideration contemplated by Luck can best be achieved by having the defendant take the stand out of the presence of the jury to permit testimony as to any prior convictions.

Trial counsel requested the District Judge to limit the use of Appellant's prior criminal record for purposes of impeachment and made known the nature of Appellant's testimony as well as his prior record. However, the District Judge failed to apply the standards established in Luck and thereby failed to properly exercise his discretion on the issue.

As stated in Gordon, supra, and Barber v. United States, No. 21,281, D.C. Cir., March 8, 1968, Luck contemplated an on-the-record consideration by the District Judge. Here the record shows that the District Judge examined Appellant's record and ruled without explanation and without the benefit of questioning Appellant or hearing counsel that all prior convictions could be used for impeachment.[9]

7/ Conversely, this Court has suggested that impeachment should be limited to crimes directly relating to veracity, e.g., perjury. Stevens v. United States, 125 U.S. App. D.C. 239, 240, 370 F.2d 485, 486 (1966) (Fahy, J. dissenting); Brown v. United States, 125 U.S. App. D.C. 220, 223, 370 F.2d 242, 245 (1966).

8/ Accord, Brown v. United States, supra, at 221, 370 F.2d at 243, where this Court stated: "reciting a defendant's prior criminal record to the jury can be highly prejudicial, especially where, as here, the prior offense [assault with a dangerous weapon] is a crime similar to the one on trial [assault on a police officer]."

9/ Although Appellant's record was listed (Tr. 147) as "four pages long", the only convictions which could possibly be used for impeachment were the three read into the record by the Assistant United States Attorney. Thus, there was no culling the record as exhibited in Payne, supra.

No questions were asked by the District Judge as to the nature of the prior convictions or the circumstances surrounding them. For example, it was not ascertained whether Appellant's prior convictions followed guilty pleas or jury verdicts. Gordon v. United States, supra, at ____, n.8, 383 F.2d at 940 , n.8. In sum, the District Judge, for all that appears on the record, did not consider any of the relevant factors set forth in Luck which should guide him in exercising his judicial discretion in this area. Luck contemplated an on-the-record consideration by the trial judge; however, there was no such evaluation in this case.

Moreover, the record does not show that the District Judge considered Appellant's age or the type of crime involved in the prior conviction of grand larceny in 1951. This conviction occurred approximately 16 years prior to the trial in this case when Appellant was approximately 19 or 20 years of age. This remoteness certainly was a relevant factor which should have been evaluated. Gordon v. United States, supra, at ____, 383 F.2d at 940; Luck v. United States, supra, at 157, 348 F.2d at 769. In addition, it is submitted that the record shows that the District Judge was prepared to permit impeachment by use of Appellant's 1957 conviction for assault on a police officer (Tr. 147). It is difficult to discern a relationship between credibility and a crime of assault. Gordon v. United States, supra; Brown v. United States, supra. Although Appellant was not ultimately impeached for this conviction, the lack of meaningful consideration given to it by the District Judge is important in determining whether he properly exercised

his judicial discretion overall.[10/]

Finally, based on the record, it does not appear that the District Judge "weigh[ed] the probative value of the convictions as to the credibility against the degree of prejudice which the revelation of his past crimes would cause." Gordon v. United States, supra, at _____, 383 F.2d at 939. As discussed, the government's direct case against Appellant was extremely weak. Although Appellant was identified by several witnesses as being present at the scene of the robbery, the question of his participation as an aider and abettor was at least doubtful. Appellant's explanation of his presence was thus "critical" under the particular facts of this case. As stated in Brown, supra, at 223, 370 F.2d at 245:

> "This is a classic illustration of a case in which the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility."

Under the facts of this case, Appellant should have been permitted to present his evidence free from the prejudice flowing from cross examination as to his prior convictions. The District Judge was called on to make a meaningful exercise of his judicial discretion under Luck. The failure to exclude impeachment as to prior convictions amounted to an abuse of discretion requiring reversal. Brown v. United States, supra.

10/ As stated, Appellant's 1962 attempted housebreaking conviction was used in part to impeach a particular item of his testimony (Tr. 173-175), rather than as general impeachment of his entire testimony. Of course, it is the 1951 grand larceny conviction which was used for purposes of general impeachment (Tr. 202) which most offends the Luck case. Reference to Appellant's 1951 conviction was the final question asked on cross examination. The District Judge thus had an opportunity to reconsider his ruling in light of all of Appellant's prior testimony.

III

The District Judge Failed to Properly Instruct The Jury on The Question of Appellant's Participation in The Commission of the Robbery

As already stated, Appellant conceded that he was present at the scene of the robbery.[11/] Moreover, although Appellant did not know the man, he did not challenge the fact that he was in the company of a person identified by government witnesses as the assailant. However, presence, even coupled with knowledge, is not sufficient to prove Appellant guilty beyond a reasonable doubt as an aider and abettor. The government was required to prove that Appellant in some way associated himself with and participated in the commission of the offense. Nye & Nissen v. United States, 336 U.S. 613, 619 (1949).

Likewise, it was incumbent upon the District Judge to instruct the jury with extreme meticulousness as to the precise role Appellant played. This is especially true where, as here, the government in its direct case was content to let the jury infer guilt from Appellant's presence and subsequent flight. Only in closing argument did the Assistant United States Attorney suggest what specific role Appellant might have had, that is, either as the planner of the robbery or as the lookout (S. Tr. 20). Viewing the whole charge, it is submitted

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11/ Although identification was not at issue, at least after Appellant testified, on any remand this Court should make clear that the government may not have each witness substantiate his courtroom identification by reference to earlier out-of-Court identifications of Appellant.

that the District Judge never properly instructed the jury that they must be convinced beyond a reasonable doubt not only that Appellant was present but also that he was doing something to forward the crime. Cooper v. United States, 123 U.S. App. D.C. 83, 357 F.2d 274 (1966); United States v. Garguilo, 310 F.2d 249 (2nd Cir. 1962).

As stated in Cooper v. United States, supra, at 86, 357 F.2d at 277 (Bazelon, C. J., separate opinion):

> "[C]larity and fairness to appellant required the judge to point out that identification would establish Cooper's presence only, and that conviction would require a belief that he joined in the robbery or aided in its commission."

Similar fairness is even more necessary in this case. In Cooper, the presence of Appellant was at issue so that it was somewhat understandable that the trial judge failed to emphasize the question of his participation. However, in this case, Appellant's presence was not in issue, only his participation was in question. Thus, more was required by the District Judge on this aspect of his charge to the jury.

As in United States v. Garguilo, supra, 310 F.2d at 254, the instruction on aiding and abetting was correct insofar as it went. However, reading the entire charge, the jury may have been misled into finding presence and knowledge on the part of Appellant to be sufficient to convict of aiding and abetting. The District Judge specifically instructed the jury that the government had to prove beyond a reasonable doubt the identity of Appellant (Tr. 214). Yet nowhere was similarly clear language employed to instruct the jury as to the degree of Appellant's participation. As stated by Judge Friendly in United

States v. Garguilo, supra, 310 F.2d at 254:

> "Never were the jurors told in plain words that mere presence and guilty knowledge on the part of Macchia would not suffice unless they were also convinced beyond a reasonable doubt that Macchia was doing something to forward the crime - that he was a participant rather than merely a knowing spectator."

Although no objection was made at the trial as to the adequacy of the instructions on this point, under the facts of this case it is submitted that this constitutes plain error requiring reversal for a new trial under Rule 52(b), Fed. R. Crim. P. 12/ Cooper v. United States, supra, at 85, 357 F.2d at 276; United States v. Garguilo, supra, 310 F.2d at 254-255.

Request for Relief

The appropriate remedy in this case is to vacate Appellant's conviction and enter a judgment of acquittal. In the alternative, this Court should remand the case to the District Court for a new trial.

12/ In Hunt v. United States, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963), this Court held that it was not necessary to give an "every reasonable hypothesis" instruction in a circumstantial evidence case if the jury is otherwise properly instructed on reasonable doubt. However, the Court also stated that it would not be improper to give such an instruction. Of course, where the reasonable doubt instruction is insufficient an instruction that conviction is warranted only if the facts proved are consistent only with guilt and are inconsistent with innocence would be proper and necessary.

Conclusion

Based upon the foregoing, it is respectfully requested that the judgment of conviction entered by the District Court in Criminal Case No. 1277-66 must be set aside.

Respectfully submitted,

/s/ Bernard J. Long, Sr.
By_____
Bernard J. Long, Sr.

/s/ Alan C. Campbell
By_____
Alan C. Campbell

Attorneys for John L. Bailey, Appellant
(By Appointment of this Court)

March 25, 1968

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,428

JOHN L. BAILEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
EARL J. SILBERT,
JAMES R. PHELPS,
Assistant United States Attorneys.

C.R. No. 1277-66

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Whether the evidence was sufficient to warrant the trial court's denial of the motions to dismiss, when the Government's case was based on an aider and abettor theory, and when the evidence showed that appellant and the gunman were seen together on the scene shortly before the robbery, were together at the time of the robbery, and fled the scene of the robbery together, following a circuitous escape route around the block?

2) Whether the court abused its discretion under *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965) by allowing impeachment of appellant with two of his convictions, for grand larceny and attempt housebreaking, when appellant only asked the trial court whether it would allow such impeachment, offered no reasons why it should not, did not ask that such impeachment be disallowed, and did not object to such impeachment, and when the court nonethless required a proffer of appellant's testimony, examined the criminal record, and, even though the hearing was antecedent to *Gordon* v. *United States*, —— U.S. App. D.C. ——, 383 F.2d 936 (1967), the court limited the impeachment to crimes involving dishonesty?

3) Whether there was plain error affecting substantial rights in the trial court's charge on aiding and abetting, when there was no objection to the charge at trial, when appellant concedes the technical correctness of the charge, and when appellant only argues the defect to be that the charge might have been confusing or unclear?

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TABLE OF CASES

OTHER REFERENCES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,428

JOHN L. BAILEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was tried September 5-7, 1967 by a jury before District Judge Sirica on a one count indictment charging the offense of robbery, 22 D.C. Code § 2901. Appellant was charged with robbing William C. Lawson of about $1900 in money belonging to the Center Market Provision Company.

The Government's Direct Case

On September 26, 1966, at about 6:45 p.m., William C. Lawson, a bookkeeper for the Center Market Provision Company, 115 R Street, S.W., left that place of business

and came down the steps of the loading platform to where his car was parked (Tr. 4-6, 9-10). He was carrying the company's receipts, $1900 in cash and some change and checks, for deposit in the bank (Tr. 10-11). Two men were standing behind the company's truck, which was parked next to Lawson's automobile (Tr. 9). As Lawson went to put the receipts in his car trunk, one of the men moved around behind him, pointed a pistol and took the receipts. The second man was about ten feet away, closer to the street. After the robbery the two men ran off down the street. (Tr. 9-10.) The man with the gun was stocky in build, and Lawson identified the other man as looking like appellant (Tr. 11-13).

Others had seen appellant in the area prior to the robbery. Joseph Tylor, from the rear of 1711 First Street, S.W., saw appellant and an unidentified man loitering in the area of Center Market Provision Company for about one-half hour, shortly before the robbery. He saw appellant leave the other man, only to rejoin him across the street from Center Market Provision Company. (Tr. 42-48.) Other witnesses, Raymond Hawkins, Burt Kearns, and Nathaniel Couser, all shot craps with appellant, shortly before the robbery and on the site where it occurred (Tr. 67-71, 84-86, 106-107). Before the game, Kearns and Couser saw appellant with the unidentified man across the street from the Center Market Provision Company (Tr. 80-81, 107, 117-118), and after the game Couser saw appellant go back across the street to the truck next to which the unidentified man stood (Tr. 123). Kearns also saw appellant, after the game, go back across the street to join the unidentified man (Tr. 86), who was described as a stocky man, shorter than appellant (Tr. 11, 88, 90, 99). Couser next saw appellant and the unidentified man cross the street together and go behind the company truck which stood on the Center Market Provision Company lot (Tr. 124). Appellant then moved towards the curb, about ten feet from Lawson's car (Tr. 89). When Lawson came out, the unidentified shorter man pointed a silver-barrelled pistol and took the money,

and Kearns yelled (Tr. 10, 89-90, 125). Witnesses Couser, Kearns, and Tylor all identified appellant as fleeing the scene of the robbery *with* the unidentified gunman (Tr. 49-51, 64, 89-91, 98-99, 112-115, 125). Couser and Kearns followed the two as they ran together down R Street to Second Street, then to Q Street, and then to First and Q, and then they lost them (Tr. 90-91, 112-115).

The *Luck* Question

At the conclusion of the Government's case, appellant's motion for judgment of acquittal was denied (Tr. 145). Then defense counsel asked "whether or not (the trial court) would permit the government to impeach the defendant by using prior convictions" (Tr. 145). The court then required a proffer of appellant's testimony (Tr. 146) and examined his criminal record (Tr. 146-147). The court said it would allow convictions of crimes of "moral turpitude" to be used (Tr. 147) and adopted the Assistant United States Attorney's suggestion that only appellant's grand larceny and attempt housebreaking convictions be used, to the exclusion of the conviction for assault on a police officer (Tr. 147-149, 160-161). The court's statements regarding the prior convictions are somewhat mingled with statements on appellant's questions regarding the Government's proposed use of appellant's confession of the crime for impeachment (Tr. 145-168). During these deliberations, appellant at one point declared, through his attorney, that he would not take the stand if he could be impeached both with his confession and the two convictions (Tr. 157). But he did testify (Tr. 168) after the Government said his confession would not be used (Tr. 166). Appellant offered no reason why any convictions should be excluded, never asked that any convictions be excluded, and never objected to their use for impeachment (Tr. 173, 202).

Appellant's Defense

Appellant testified that he indeed had been on the scene when the robbery occurred, but that he had not been a participant. He said he was standing on Center Market Provision Company's lot counting his winnings from the crap game when he heard someone yell about the robbery. He got excited then, and ran off. (Tr. 168-171.) Appellant said he did not stand behind the company's truck with anyone (Tr. 199). Further, appellant testified that as he ran from the scene he was alone, that no one was running by his side, and he heard no footsteps (Tr. 202). The motion for judgment of acquittal was renewed and denied (Tr. 203).

Instructions and Verdict

Prior to instructing the jury, the court read the "standard" instruction for aiding and abetting (Tr. 204-206), and asked for objections or additions (Tr. 206-207). Appellant offered neither. The next day the court instructed the jury and then had the following exchange with defense counsel:

> THE COURT: Mr. Weinstein, do you have any objection to any part of the Court's charge?
>
> MR. WEINSTEIN: No, Your Honor. The only thing that I would ask, Your Honor, I don't know whether the facts indicate an instruction on attempt robbery or not.
>
> * * * *
>
> THE COURT: . . . Outside of that do you have any requests for further instructions outside of the ones you have already submitted?
>
> MR. WEINSTEIN: I don't believe so. I am satisfied.

(Tr. 225.)

The jury found appellant guilty (Tr. 227).

STATUTES AND RULES INVOLVED

Title 22, District of Columbia Code, Section 105 provides:

> In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

Title 22, District of Columbia Code, Section 2901 provides:

> Whoever by force or violence, whether against resistance, or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another, anything of value is guilty of robbery.

Rule 30, Federal Rules of Criminal Procedure, provides in pertinent part:

> . . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . . .

Rule 52, Federal Rules of Criminal Procedure, provides:

> (a) Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

I

The evidence was sufficient to show appellant was an aider and abettor to the gunman who was the principal actor in the robbery, and the motions for judgment of acquittal were properly denied at the end of the Government's and defendant's cases. The Government's case showed a pattern of close association between the appellant and the gunman. They were at the scene of the crime that day, together. Further, appellant stayed with the gunman at the scene of the robbery, except when he shot craps with the Government's witness. Appellant rejoined the gunman after the game, then moved with the gunman to the place where the gunman relieved the victim of the money. Then appellant ran together with the gunman on a circuitous escape route around the block, where they escaped their pursuers. On appeal the evidence must be viewed in the light most favorable to the Government, and viewing the record of this case in such a light, one could reasonably infer from the Government's evidence that appellant was a partner to the gunman.

II

Appellant never invoked the trial court's discretion under the *Luck* case. He only asked whether the court was going to allow impeachment with the criminal record. Appellant never asked the court to disallow use of the record, never gave any reason why the record should not be used, and never objected when the record was used to impeach. Even though appellant never invoked its discretion, the court demonstrated its knowledge of *Luck* by requiring a proffer of appellant's testimony, examining the record, and deciding that convictions of crimes of "moral turpitude" could be used to impeach. Further, the court agreed to limit impeachment to crimes involving dishonesty: grand larceny and attempted housebreaking. No abuse of the court's discretion should be found when its

discretion was not invoked and when the decision to allow impeachment with two convictions was reached after careful consideration and exercise of the court's discretion.

III

The court's charge on aiding and abetting was correct on the law, and appellant concedes as much in his brief. Appellant did not object to the court's charge at trial, and now only argues that the jury may have been misled on the issue of aiding and abetting if the instructions are read as a whole. The burden was on appellant at trial to object to a correct instruction which he considered unclear or confusing, or to offer clarifying instructions. Having failed to do either of these things, appellant should not now be allowed to raise objection to the correct instructions.

ARGUMENT

I. The evidence of Bailey's participation in the crime was sufficient to deny the motions for judgment of acquittal and to sustain the conviction.

Appellant argues that the evidence adduced at trial was insufficient to sustain his conviction, and that the trial court therefore erred in failing to grant his motions for judgment of acquittal.

It is well settled that when a verdict is attacked on grounds of insufficiency of the evidence, the reviewing court should view the evidence in the light most favorable to the Government, making full allowance for the right of the jury to assess the credibility of witnesses and to draw justifiable inferences from the evidence. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Crawford* v. *United States*, —— U.S. App. D.C. ——, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947); *Morton* v. *United States*, 79 U.S. App. D.C. 329, 147 F.2d 28, *cert. denied*, 324 U.S. 875 (1945).

To be an aider and abettor, it ". . . is only necessary that the defendant knowingly associate himself in some way with the criminal venture. . . ." *Long* v. *United States*, 124 U.S. App. D.C. 14, 20, 360 F.2d 829, 835 (1966); *Nye and Nissen* v. *United States*, 336 U.S. 613 (1949). And presence alone is sufficient to convict if that presence is intended to and does aid in the commission of the offense. *Long* v. *United States, supra; United States* v. *Ragland*, 375 F.2d 471, 478 (2d Cir. 1967); *United States* v. *Garguilo*, 310 F.2d 249 (2d Cir. 1962).

Construing the evidence in the instant record most favorably for the Government, there is ample testimony on which the jury could base its finding of guilty.[1] The evidence showed a pattern of close association between appellant and the gunman prior to the robbery. They were at the scene earlier in the day, before the robbery, together (Tr. 42-48). Appellant shot craps by the Center Market Provision Company shortly before the robbery (Tr. 68-71, 80-81, 84-86, 106-107), and he was seen with the gunman across the street before the crap game started (Tr. 80-81, 107, 117-118). The gunman stayed across the street during the game and appellant rejoined him when the game was over (Tr. 86-87, 123). Afterwards, appellant and the gunman were seen to cross back over the street to a position behind the Center Market Provision Company's truck (Tr. 124). Then appellant moved towards the curb, about ten feet from the victim's car (Tr. 89). Lawson came out and the gunman drew the pistol and robbed him as appellant stood nearby (Tr. 10, 89-90).

After the robbery, viewing the record favorably for the Government, appellant's close association with the gunman continued to point to appellant's guilt. When the gunman got the money, he and appellant ran off *together*

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[1] The evidence at the close of the Government's case and at the close of appellant's case, when viewed from the standpoint of sufficiency of the Government's proof, is virtually the same, since appellant's testimony only substantiated the abundantly proven point of his presence at the scene and offered a denial of guilt.

(Tr. 49-51, 64, 89-91, 98-99, 112, 125). Witnesses Couser and Kearns followed the fleeing appellant and gunman as their running legs *together* traced a circuitous escape route down R Street to Second Street, then to Q Street, and then to First and Q, where the pursuers lost them (Tr. 90-91, 112-115). Appellant never addresses himself to this evidence, which quite clearly shows appellant and the gunman were acting in concert.

In his brief appellant artfully divides the Government's evidence before considering it. First he finds that his presence at the scene of the crime with the principal actor is insufficient. Then he finds that his flight from the scene, standing alone, is insufficient. But the judge, first at the close of the Government's case then at the close of appellant's, and then the jury, in their turn, were entitled to view the Government's evidence as a whole. Viewing the evidence as a whole, from appellant's association with the gunman before the robbery until they finally eluded their pursuers at First and Q Streets, it is clear that the jury could conclude beyond a reasonable doubt that appellant and the gunman were joined in an association to commit the robbery.

II. Appellant did not invoke the trial court's discretion under *Luck*, and should not now be allowed to claim that the trial court abused its discretion; but even so, that court properly exercised its discretion in allowing appellant to be impeached with two convictions for crimes involving dishonesty.

Appellant contends the trial court committed prejudicial error by allowing his criminal convictions for grand larceny and attempt housebreaking to be used for impeachment.

At the time of trial, appellant, before taking the stand, did no more than ask ". . . whether or not Your Honor would permit the government to impeach by using prior convictions." (Tr. 145). At no time did appellant offer any reason why the convictions should be excluded; in fact, appellant at no time ever even asked that any prior

conviction be excluded. Appellant did say that, if the Government was allowed to use *both* his confession of the crime as well as the two convictions for impeachment, he would not take the stand (Tr. 157). But after the Government decided not to use the confession (Tr. 166), appellant did testify, and no objection was made when he was impeached with the two convictions.

To claim on appeal an abuse of discretion under *Luck* v. *United States, supra,* a defendant must at trial make a meaningful invocation of the trial court's discretion and object to use of the criminal record. *Evans* v. *United States,* —— U.S. App. D.C. ——, —— F.2d —— (Nos. 20,480 & 20,481, decided May 8, 1968); *Green* v. *United States,* —— U.S. App. D.C. ——, —— F.2d —— (No. 21,519, decided April 30, 1968); *Lewis* v. *United States,* No. 21,083, D.C. Cir., February 13, 1968; *Gordon* v. *United States,* —— U.S. App. D.C. ——, 383 F.2d 936 (1967); *Stevens* v. *United States,* 125 U.S. App. D.C. 239, 370 F.2d 485 (1966); *Hood* v. *United States,* 125 U.S. App. D.C. 16, 365 F.2d 949 (1966); *Walker* v. *United States,* 124 U.S. App. D.C. 194, 363 F.2d 681 (1966), *cert. denied,* 386 U.S. 922 (1967). The progress of this trial, as related to the *Luck* issue, is similar to the *Hood, Evans,* and *Walker* cases, *supra.* In *Hood* the defendant asked the court if the Government could impeach with a prior conviction and did no more than cite *Luck.*

> No representation was made to the trial court as to what Hood's testimony would be, or why it was important that, at least in this case, the court's discretion should be exercised to prohibit introduction of the prior conviction. Indeed, the court was not even told the nature of the crime for which Hood had previously been convicted (footnote omitted). Defense counsel simply asked for a ruling and referred to *Luck.*

Id. at pp. 17-18, 365 F.2d at 950-951. This Court held that there was no meaningful invocation of the trial court's discretion and that it was ". . . not disposed in

such case to find abuse." *Id.* at p. 18, 365 F.2d at 951. In *Evans* the defendant cited *Luck* and asked that the record be excluded, citing as his reason only that there were inconsistencies in the Government's case; This Court held that the defense ". . . must show how and why (his) case calls for a discretionary 'exemption' from the impeachment permitted by statute." *Evans* v. *United States, supra,* slip opinion at 7. A defendant must meet this burden at trial by ". . . demonstrating some affirmative reasons. . . ." *Id.* slip opinion at 6. In *Walker* v. *United States, supra,* this Court refused to find an abuse of discretion when the defendant did not invoke *Luck* and failed to object when he took the stand and was impeached with his record. As in *Hood, Evans,* and *Walker,* appellant failed to invoke the trial court's discretion, and as in *Walker* appellant failed to object when he was impeached. It is submitted that this Court should find the trial court's discretion was not abused, since it was never meaningfully invoked.

The trial court, notwithstanding appellant's assertions, carefully exercised its discretion. And, even though the trial was held almost two weeks before the *Gordon* opinion,[2] the trial court reached a conclusion consonant with that decision. The record shows the trial court made its decision after requiring a proffer of appellant's testimony (Tr. 146) and examination of appellant's criminal record (Tr. 146-147). The court said it was exercising its discretion and that crimes of "moral turpitude" could be used to impeach (Tr. 147), and then adopted the suggestion of the Assistant United States Attorney that only the grand larceny and attempt housebreaking convictions be used, to the exclusion of the assault on a police officer conviction (Tr. 147-149, 160-161). So, even though this Court has not required pre-*Gordon* trial rulings to meet squarely the standards of procedure and result suggested in that decision,[3] the trial court in the instant case did

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[2] *Gordon* v. *United States,* —— U.S. App. D.C. ——, 383 F.2d 936 (1967), decided September 18, 1967.

[3] *Williams* v. *United States,* —— U.S. App. D.C. ——, —— F.2d —— (No. 20,583, decided April 5, 1968); *Payne* v. *United States,*

demonstrate a knowledge of *Luck*, did take pains to consider what convictions could be used, and even anticipated *Gordon* by allowing impeachment with crimes reflecting adversely on honesty. This being so, it cannot be said that the trial court abused its discretion by allowing impeachment of appellant with two of his prior convictions. *Williams* v. *United States*, *supra*; *Payne* v. *United States*, *supra*; *Young* v. *United States*, No. 20,269, D.C. Cir., April 14, 1967.

III. The trial court's charge on aiding and abetting was correct and did not constitute plain error affecting substantial rights.

At the conclusion of the trial, the court asked if there was any objection to any part of the charge. Appellant's lawyer said that his only doubt was as to whether an attempt robbery instruction would be indicated. Apart from that, he said he was satisfied with the instructions (Tr. 225). Now appellant asks that his conviction be overturned because the instructions were unsatisfactory.

Appellant's attack on the charge does not focus on any particular error, though it is addressed generally to the way the court instructed on aiding and abetting. Appellant concedes that "the aiding and abetting instruction was correct, insofar as it went." (Appellant's Brief, p. 26.)[4] But appellant says that, viewed as a whole, the charge failed to instruct the jury properly on aiding and abetting, in that they "may have been misled into finding presence and knowledge on the part of appellant to be sufficient to convict of aiding and abetting." *Ibid.* Appellant says there was no "clear language employed to instruct the jury as to the degree of appellant's participation." *Ibid.* Because of this, appellant says, there was

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—— U.S. App. D.C. ——, —— F.2d —— (Nos. 21,232 and 21,233, decided March 5, 1968).

[4] The Government takes this remark, occurring in a context where appellant cites no specific error in the charge, to mean that appellant concedes the technical correctness of the instruction.

plain error within the meaning of Rule 52(b), Fed. R. Crim. P.[5]

It is well settled that "once the judge has made an accurate and correct charge, the extent of amplification

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[5] The trial court's charge included the following:

> . . . . If you find beyond a reasonable doubt that the defendant committed or aided and abetted any other person or persons in committing the offense in any one of the ways set forth in the indictment, that would be sufficient and the defendant, of course, would be guilty of the indictment. . . .
>
> Now you may find the defendant guilty of the crime of robbery, which has been charged in the indictment, without finding that he personally committed each of the acts constituting the offense. Any person who advises, incites or connives at an offense, or aids or abets the principals offender, is punishable as a principal, that is, he is as guilty of the offense as if he had personally committed each of the acts constituting the offense. A person aids and abets another in the commission of a crime if he knowingly associates himself in some way with the criminal venture with the intent to commit the crime, and participates in it as something he wishes to bring about and seeks by some action of his to make it succeed.
>
> * * * *
>
> Some conduct by the defendant of an affirmative character in furtherance of a common criminal design, scheme or purpose, is necessary.
>
> * * * *
>
> Now mere physical presence of a defendant at the time and place of the commission of an offense is not in and of itself sufficient to establish the guilt of the defendant. However, mere presence would be enough if it is intended to and does aid the primary actor or actors, but it is not necessary that any specific time or mode of committing the offense shall have been advised or commanded, or that it shall have been committed in the particular way instigated or agreed upon, nor is it necessary that there shall have been any direct communication between the actual perpretrator and the defendant.
>
> * * * *
>
> If facts and circumstances have been introduced into evidence which raise a reasonable doubt about whether the defendant was the person who committed the crime charged or whether he aided, abetted or assisted some other person in the commission of the crime, then the jury should find him not guilty. On the other hand, if from the evidence you believe beyond a reasonable doubt that the defendant by himself, or with some other person, did commit the crime set forth in the indictment, then you should find him guilty. (Tr. 211-215.)

must rest largely in his discretion." *United States* v. *Bayer*, 331 U.S. 532, 536 (1947); *Howard* v. *United States*, —— U.S. App. D.C. ——, —— F.2d —— (No. 20,328, decided December 6, 1967). If appellant considered the language of the charge to be unclear or confusing, then it was his duty to object or to offer a clarifying instruction, and failure to take those steps should preclude his raising the point on appeal. Rule 30, Fed. R. Crim. P. *Robertson* v. *United States*, 124 U.S. App. D.C. 309, 364 F.2d 702 (1966); *Madison* v. *United States*, 125 U.S. App. D.C. 26, 365 F.2d 959 (1966); *Williams* v. *United States*, 116 U.S. App. D.C. 131, 321 F.2d 744 (1963).[6]

This Court in *Blair* v. *United States*, —— U.S. App. D.C. ——, —— F.2d —— (Nos. 21,033 and 21,034, decided May 2, 1958), considered an argument very similar to the one advanced by appellant and dismissed it in a footnote:

> Blair's only other point which requires our attention relates to the trial court's instruction on aiding and abetting. Blair testified on trial that, while he accompanied the robbers to the department store, he did not participate in planning the robbery or in its execution. On appeal he taxes the trial court with failure to instruct the jury that mere presence at, knowledge of, or failure to resist or prevent a crime is not sufficient to establish aiding and abetting. No

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[6] In *Williams*, a robbery case, the trial judge instructed on circumstantial evidence and in so doing

> . . . made certain statements which may have implied that the jury could infer guilt from circumstances without first resolving conflicts in testimony over whether the circumstances occurred.

Id. at p. 133, 321 F.2d at 746. The Court of Appeals held that there was no plain error, saying that had

> . . . defendant objected to these statements and requested a more precise instruction on the nature of testimonial circumstantial evidence and the function of the jury in evaluating it. failure to heed the request would have been reversible error.

Ibid.

such instruction was requested and no exception was taken to the charge as given. The charge included:

> "Now, a person aids and abets another in the commission of a crime if he knowingly associates himself in some way with the criminal venture with the intent to commit the crime and participates in it as something he wishes to bring about, and seeks by some action of his to make it succeed.
>
> * * * *
>
> "So conduct by a defendant of an affirmative character in the furtherance of a common criminal design, scheme or purpose is necessary."

Under the circumstances, we find the trial court's charge on aiding and abetting sufficient. (Citations omitted.)

Id., slip opinion, footnote 1 at pp. 2-3.

In this case, as in *Blair*, the charge of the trial court was correct. And also as in *Blair* appellant took no exception to the charge given, and suggested no additional clarifying charge to satisfy himself that the jury would be instructed, in what he considered to be an adequate way, as to what was necessary to convict or acquit him. Clearly then, the jury's verdict should not be disturbed on the basis of appellant's post-conviction speculation that they "may have been misled." [7]

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[7] Appellant's reliance upon *United States* v. *Garguilo*, 310 F.2d 249 (2d Cir. 1962) is misplaced. The Court of Appeals found plain error, in the face of correct aiding and abetting instructions, because of the "exceptional circumstances" of that case. *Id.* at pp. 254-255. In *Garguilo* the defendant Macchia was connected to the crime by tenuous evidence; and, while an understanding that defendant had to be a purposive participant was important, the court's charge on the point was vague, and the hypothetical illustrations used by the court unwarrantedly emphasized knowledge as a consideration around which the jury's decision could turn. *Id.* at p. 254. Those exceptional circumstances do not exist in this case.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
EARL J. SILBERT,
JAMES R. PHELPS,
Assistant United States Attorneys.

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